United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

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To be argued by
DAVID A. DE PETRIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2272

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

ANTHONY LA VECCHIA, EDWARD BOGAN, HERBERT KURSHENOFF and NICHOLAS ANDRIOTIS,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
DAVID A. DE PETRIS,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

This is an appeal from judgments of conviction entered in the United States District Court for the Eastern District of New York (Judd, *J.*), after a jury trial which convicted all the appellants of a single conspiracy between June, 1971 and February, 1973, to possess and distribute (along with seven other named conspirators) substantial quantities of counterfeit $10 Federal Reserve Notes (Count Twelve; T. 18 U.S.C. § 371). Eleven of the overt acts of that conspiracy were pleaded as substantive violations of T. 18, U.S.C. §§ 472 and 473 (Counts One through Eleven) and, with the exception of one appellant, Kurshenoff, who was not charged with any substantive crime in the Eastern District, each appellant was convicted of at least one substan-

tive crime.* Appellants are currently released pending appeal.

The following contentions are raised on this appeal: (1) appellants LaVecchia and Bogan challenge the trial court's charge as being unfair and improper, (2) appellant La Vecchia argues that the search of his car was illegal, (3) all appellants argue that there were multiple conspiracies proved and (4) appellants LaVecchia and Bogan challenge the validity of a search warrant executed at 270 Lafayette Street, New York City.

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* The judgments of conviction were entered as follows: Herbert Kurshenoff—September 13, 1974; Edward Bogan—September 20, 1974; Anthony LaVecchia—September 26, 1974; and Nicholas Andriotis—October 18, 1974.

Anthony LaVecchia was convicted on four counts involving the possession and distribution of counterfeit money (Title 18, United States Code, § 472 and § 473) and one count for conspiracy to do the above (Title 18, United States Code, § 371). LaVecchia was sentenced to concurrent terms of four years imprisonment on each count and a fine of $5000.

Edward Bogan was convicted of one count involving the distribution of counterfeit money and also of a conspiracy to do so. Bogan was sentenced to concurrent terms of four years imprisonment.

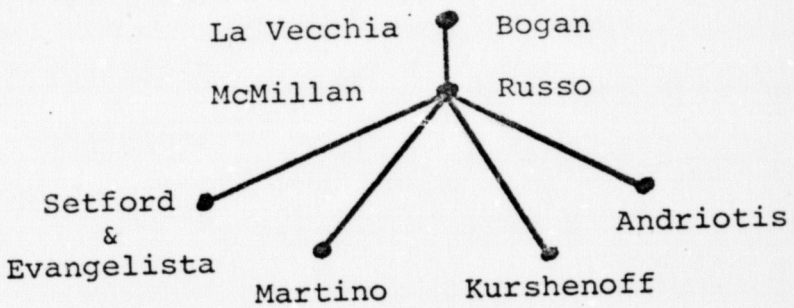
Herbert Kurshenoff was convicted for conspiracy to possess and distribute counterfeit currency and was given a split sentence of eighteen months, with six months imprisonment and the remainder on probation plus a fine of $750.

Nicholas Andriotis was convicted on two counts, one for the receipt of counterfeit money and the other for conspiracy to possess and distribute the bogus currency. Andriotis was given a split sentence of one year, with four months imprisonment and the balance suspended, plus probation for two years on each count, the sentence to run concurrently.

Statement of Facts

(1)

Appellants were charged with and convicted of a conspiracy to receive, possess, distribute and sell counterfeit money from June, 1971 to February, 1973 and also various substantive transactions during the tenure of the conspiracy. The role or function played by each of the appellants in this counterfeit operation can be briefly described as follows: LaVecchia, the kingpin and wholesale distributor, Bogan, the printer, and Andriotis and Kurshenoff two of several retail distributors. John McMillan and Dominic Russo, who pleaded guilty and testified, were mid-level distributors. Other retail distributors who were co-conspirators were Albert Evangelista, also known as "Alibi", Albert Setford, also known as "Spike", and Philip Martino. Below is a diagram of the structure of this counterfeit operation.



The evidence offered at the trial of appellants included, among other things, (1) the testimony of the two mid-level co-conspirators, McMillan and Russo, who told of their involvement with appellants and others in this counterfeit operation; (2) the testimony of various Secret Service agents as to purchases of counterfeit $10 notes from several co-conspirators and surveillance of LaVecchia and Bogan on February 13th and 15th, 1973; (3) the seizure of hun-

dreds of thousands of dollars in counterfeit $10 notes plus counterfeit plates and negatives; (4) a fingerprint expert who identified appellant Bogan's prints as appearing on certain of the counterfeit notes, plates, negatives and other paraphernalia seized; (5) the seizure of pre-recorded Government funds used for the purchase of counterfeit notes from appellant LaVecchia's person and his vehicle; (6) a tape recording of a conversation between McMillan and appellant LaVecchia, and (7) the testimony of a counterfeit expert connecting the counterfeit notes purchased or seized by Secret Service agents from the several co-conspirators between 1971 and 1973 with the counterfeit notes, plates and negatives seized on February 15, 1973 at appellant Bogan's place of business.

(2)

John McMillan testified that in June, 1971 Albert Evangelista inquired if he could obtain counterfeit currency. McMillan, who previously had seen counterfeit $10 notes at appellant LaVecchia's house and had discussed a purchase with him, arranged to purchase $300,000 in counterfeit notes on consignment from LaVecchia for nine points; i.e. 9¢ on the dollar(T. 538-543, 558).* Upon receiving the counterfeit money from LaVecchia,** McMillan over the next several weeks sold the counterfeit in varying quantities to Evangelista, Albert Setford, Dominic Russo and others.*** After McMillan received the money from the

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* References designated as "T" are to the pages of the trial transcript, unless preceded by the letter "A" which indicates a reference to Appellants' Joint Appendix.

** McMillan testified that he had previously met with LaVecchia on several occasions, each time on business (T. 751-752).

*** Dominic Russo corroborated McMillan's testimony as to some of the counterfeit dealings which took place in 1971. In substance he testified that in June, 1971, he met with McMillan in Setford's and Evangelista's restaurant and subsequently purchased $10,000 in counterfeit notes from McMillan on consignment for 12 points. After selling the notes, he paid McMillan immediately because McMillan had stated that he had to pay "his man" (T. 397-401a).

sales, he paid LaVecchia a total of $27,000 on two occasions (T. 545-551).*

In June, 1972, McMillan and Russo met in the real estate office where Russo worked and discussed getting more counterfeit notes to sell.** Thereafter, McMillan again contacted LaVecchia, obtained $25,000 in counterfeit $10 notes and delivered the notes to Russo's house. Prior to receiving the $25,000 package, however, Russo had contacted appellant Kurshenoff and discussed a prospective purchase of counterfeit notes. Thereafter, Russo had shown Kurshenoff some samples and Kurshenoff expressed an interest in purchasing some. Thus, when Russo received the $25,000, he contacted Kurshenoff and told him that he had received it. Russo and McMillan then went to Kurshenoff's toupee shop, 'Mr. Esquire's" in New York City (McMillan waited outside), and, after a discussion as to price, Russo sold Kurshenoff $5000 in counterfeit $10 notes. The remainder of the $25,000 in counterfeit was sold to others, including Philip Martino. McMillan later met with LaVecchia, paid him for the notes and ordered another $25,000 in counterfeit notes (T. 402-406, 560-566).

McMillan received a second $25,000 package at LaVecchia's house in the summer of 1972. The package was delivered by an individual who McMillan subsequently identified as appellant Bogan.*** Thereafter, McMillan delivered the package to Russo and again accompanied Russo to Kurshenoff's toupee shop, where Russo, as prearranged,

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* Setford and Evangelista went to jail at about this time after Secret Service Agent Coppola purchased $10,000 in counterfeit $10 notes on July 15, 1971 for $1800 (T. 263, 268-272).

** Appellant Andriotis also worked at this real estate office.

*** When McMillan met Bogan at Beacon Discount Sales, 125 East 18th Street, New York City on February 15, 1973, McMillan identified Bogan's distinctive voice as being that of the individual who had delivered this second $25,000 package in the summer of 1972.

sold Kurshenoff another $5000 in counterfeit $10 notes (T. 406-407, 566-572).

After this $25,000 package was distributed, and paid for, McMillan obtained an additional $100,000 in bogus notes from LaVecchia. This was distributed to various individuals including a $10,000 package to appellant Andriotis.* The circumstances under which the delivery to Andriotis came about were as follows: In approximately August of 1972, Russo had a conversation with Andriotis, whom he had known for a few months as they both worked in the same real estate office, about bogus money. There was a disagreement about the price which Russo was going to charge; so McMillan, at Russo's request, met with Andriotis and, after a discussion about the price, an agreement was reached. A few days later, Andriotis ordered a $10,000 package from Russo at the price which McMillan and Andriotis had agreed upon. Andriotis requested Russo to deliver the package to an individual named "Paul" in the street. After this was done, Russo returned to the real estate office and was paid by Andriotis for the bogus package (T. 411-413, 574-575).

(3)

In August and September, 1972, Secret Service Agent Kramer made two purchases of counterfeit $10 notes from Philip Martino. When Martino was arrested on September 6, 1972, he agreed to cooperate and on the same day introduced Agent Coppola to Russo who thereupon sold $5000 in bogus $10 notes to Coppola. When Russo was subsequently arrested in November of 1972, he implicated McMillan as his source and also surrendered an additional $5000 in bogus currency to Secret Service agents. On January 12, 1973, McMillan was arrested and thereafter

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* Approximately $35,000 of this package was of poor quality and was therefore returned to LaVecchia by McMillan (T. 409).

implicated the other individuals with whom he had dealt in this counterfeit operation.

Subsequent to McMillan's debriefing, Agent Marquez went to the second floor of 270 Lafayette Street, New York City acting in an undercover capacity. At that location, he observed offset printing presses, signs for "Beacon Sales" and "Beacon Printing" and had a conversation with Bogan (T. 198-201).* Thereafter on February 13, 1973, under the direction of Secret Service agents and equipped with an electronic transmitting device, McMillan met with LaVecchia at Beacon Sales, 125 East 18th Street, New York City and discussed a purchase of $25,000 in bogus notes.**

On February 15, 1973, as pre-arranged, McMillan, again equipped with an electronic transmitting device and acting under the supervision of Secret Service agents, met with LaVecchia at 125 East 18th Street to consummate the counterfeit transaction. After LaVecchia outlined the manner in which the transaction would be handled,*** LaVecchia left to meet, as he stated to McMillan, the individual who had the counterfeit (T. 581, 598). LaVecchia was observed by Secret Service agents leaving 125 East 18th Street and shortly thereafter arriving at 270 Lafayette Street where Bogan's printing shop was located. After remaining in the building for a few minutes, LaVecchia exited the build-

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* At the time of the conversation, Bogan was seated behind the desk in the office of Beacon Printing. This was the room in which several hundred thousand dollars of bogus $10 notes, plates and negatives were found about one week later.

** Agent Kramer corroborated McMillan's description of his conversation with LaVecchia (T. 805-807, 811-812).

*** The counterfeit would be in a locker at Pennsylvania Station. After LaVecchia received the genuine currency ($2,500), McMillan would be given the key to the locker (T. 581). McMillan's testimony as to these arrangements was corroborated by the recording made from the transmitting device worn by McMillan on February 15, 1973 during the conversation between he and LaVecchia (T. 594-597).

ing and drove off in a blue Chrysler. Shortly after LaVecchia had left 125 East 18th Street, Bogan arrived and inquired of McMillan (who had remained there) and others as to LaVecchia's whereabouts. Bogan was told he was not there but would be back shortly.* At that point, there was a telephone call for Bogan. After having a brief conversation on the telephone, Bogan left the store, followed by agents, and was subsequently observed meeting with LaVecchia in the latter's blue Chrysler. About ten minutes later, LaVecchia picked up McMillan at 125 East 18th Street and after a short ride delivered the key to the locker to McMillan in exchange for $2500 in pre-recorded genuine currency. McMillan then met with Agent Kramer and proceeded to Pennsylvania Station where the $25,000 in bogus $10 notes was retrieved from a locker (T. 102, 106-107, 202-203, 215-216, 598-600, 821, 823, 873-874).

At this point, Agent Kramer signaled for the arrest of LaVecchia and Bogan. When this signal was given, LaVecchia was at his blue Chrysler where he was seen to open the trunk briefly and thereafter close it and enter ~~Bogan~~ Beacon Sales. Found on LaVecchia's person at the time of his arrest was aproximately three to four thousand dollars and the keys to his Chrysler. One of the $50 bills found on LaVecchia's person was subsequently determined to have been part of the pre-recorded government funds used to purchase the $25,000 bogus package. Shortly after his arrest, another agent went to the trunk of LaVecchia's car and, upon opening it, found $2,450 which was later determined to have been the remaining portion of the pre-recorded funds used for the counterfeit purchase (T. 230, 247-248, 258).

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* It was at this point that McMillan identified Bogan as the man who had delivered the $25,000 bogus package to LaVecchia at his house in the summer of 1972. McMillan transmitted this identification to the agents over the electronic device (T. 873).

After Bogan's arrest at 270 Lafayette Street, a search was conducted whereupon over $650,000 in cut and uncut bogus $10 notes, plates and negatives used to make the notes and various other paraphernalia were recovered. All of this contraband was seized pursuant to a search warrant for the office of Beacon Printing where Agent Marquez had previously met with Bogan (T. 121, 200).

Agent Robert Ball, a fingerprint specialist, identified fingerprints of Bogan as being on certain of the plates, negatives and bogus notes seized at 270 Lafayette Street as well as on the wrappings of the $25,000 package of counterfeit notes recovered from the locker at Penn Station (A. 179-220).

Agent Coppola testified as an expert in the field of counterfeit identification. He testified that he conducted an examination and comparison of the counterfeit $10 notes from the Setford and Evangelista purchase in July, 1971; the Martino purchase in August and September, 1972; the Russo purchase and seizure in September, 1972; the Penn Station locker purchase on February 15, 1973; and the 270 Lafayette Street seizure on February 15, 1973 with each other and with bogus plates and negatives also seized at 270 Lafayette Street. Coppola found that all the bogus notes were produced from the negatives which were seized on February 15, 1973 at 270 Lafayette Street (T. 324, 354).

There was no defense case.

POINT I

The charge of the District Court was proper.

Although not quite so explicit, appellants LaVecchia and Bogan contend that Judge Judd has committed again the kind of error which was the subject of this Court's cautionary warning to him in *United States* v. *Pinto*, 503 F.2d 718, 724 (2d Cir. 1974). They charge in Point I of their brief that in three instances Judge Judd included in his charge gratuitous comments on the facts which were unfair to them. Moreover, unlike in *Pinto*, where no exception was taken, they point to express objections made by their respective counsel.* Finally, they urge that Judge Judd's comments in this case "exceeded the impact of [his] remarks in *United States* v. *Pinto* . . ." (Br. p. 28).

In the Government's view, each of the statements complained of by appellants was proper and appropriate, and the charge, as a whole, was a model. Moreover, we believe the *Pinto* decision should provide no pretext for, nor does it support the kind of arguments appellants advance.

(1)

Appellant Bogan, who was so severely implicated by the presence of his fingerprints on the counterfeit printing paraphernalia, as well as the counterfeit itself, contends that his counsel's attempt to nullify that evidence in summation was undercut by Judge Judd. That attempted nullification had been focused in counsel's arguments that (1) Bogan's fingerprints were found on only a small frac-

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* At the trial, Bogan was represented by Ronald Fischetti, Esq. Appellant La Vecchia was represented by James M. LaRossa, Esq. On appeal both appellants are represented by the law firm of LaRossa, Shargel & Fischetti. There is nothing in the record, however, to show that the jury was, at any time, aware of the association between Messrs. LaRossa and Fischetti.

tion of the counterfeit; and (2) that there were several unidentified latent fingerprints which could have been left by "anyone, . . . at any time" (Br. p. 18). Thus, counsel speculated that Bogan might have been shown and handed these items after his arrest and, in that way, left his fingerprints. Appellant Bogan's brief thereafter quotes several excerpts from counsel's summation, including counsel for appellant LaVecchia, and claims that the following portion of Judge Judd's charge exceeded the bounds of proper comment as expressed in *Pinto*:

> I did not hear any testimony about what is necessary to produce clear fingerprints but I was impressed by the fact that after examining all this counterfeit money Mr. Ball found only seven latent prints besides those that were on, so apparently fingerprints do not show up every time (A. 390-A.391).

Appellant Bogan claims that ". . . this gratuitious observation not only may have contained grievous factual error, but certainly went well beyond the scope of a Trial Judge's fair comment on the evidence" (Br. p. 22).

On generally accepted knowledge, we cannot see how Judge Judd's charge "may have contained grievous factual error" when he stated that, ". . . apparently fingerprints do not show up every time." * More importantly, however, appellant Bogan's contention has no foundation in the testimony. In his cross-examination of Agent Ball, the Government fingerprint expert, appellant Bogan's counsel took a package of the bills in his hand and then asked the following questions:

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* See 5 Proof of Facts, 79 (1960) where it is stated:
In touching an object, the perspiration or the film of moisture and/or grease *may* be transferred to the object, thus leaving an outline of the ridges of the fingers thereon (emphasis added).

Q. This is a sample package of bills that came from the Exhibit, those are bills you examined? A. Yes.

Q. Those are bills you examined for Mr. Bogan's prints, is that right?

Q. What we just did here now, my fingerprints are on these bills? A. Not necessarily.

Q. They might not be? A. Might not be.

Q. Your fingerprints might be on the bills? A. Might be. (A. 214)

Later, on recross-examination, counsel asked Agent Ball about prints other than appellant Bogan's found on the money and printing apparatus.

Q. You found other prints, didn't you, Mr. Ball? A. Other latent prints.

Q Whose were they? A. I did not identify anyone else.

Q. Who is Thomas Smith? A. I don't know, sir.

Q. Who is Angel Martinez? A. I don't know the individual.

Q. How many other priints did you find you couldn't identiify? A. Several latent prints.[*] I could not identify one palm print developed on the items submitted. (A. 219)

Thus, when in summation counsel for Bogan urged the jury to infer, from nothing in the record, that appellant Bogan's fingerprints were placed on the counterfeit and printing paraphernalia *after* he was arrested, he was basing his argument on the assumption that, had Bogan then touched the money, he necessarily would have left his fingerprints. Such an argument, though undoubtedly an "inference", was not a proper inference because the evidence

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* The trial transcript reads "several" latent prints, but both the court and counsel subsequently referred to this as "seven" latent prints.

provided no facts to support it. It was, quite simply, the functional equivalent of a witness called by appellant Bogan to testify that *if,* following his arrest, Bogan had touched each and every item, it would be reasonable to suppose that his latent prints would be found. Of course, such an improper hypothetical question would properly be barred by a trial judge. We cannot understand, therefore, why a trial judge's broad discretion concerning the relevancy of evidence, *United States* v. *Gottlieb,* 493 F.2d 987, 992 (2d Cir. 1974), becomes somehow attenuated when he regulates a summation which seeks to escape the bounds of the record.* Moreover, we can perceive no difference when the trial court performs his "responsibility of insuring that the facts in each case are presented to the jury in a clear and straightforward manner," *United States* v. *Nazzaro,* 472 F.2d 302, 313 (2d Cir. 1973), during the course of his charge, or in a dignified manner during the course of the summation.**

In short, Judge Judd's charge with respect to the fingerprint evidence was fully responsive to this Court's admonition in *United States* v. *DeAngelis,* 490 F.2d 1004, 1012 (2d Cir.), *cert. denied,* 416 U.S. 956 (1974), that trial

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* In *Pinto,* Judge Judd added evidence to the case in his charge. In this case, it was counsel who was adding the evidence. Judge Judd simply and accurately recalled what the evidence was.

** Counsel for LeVecchia, against whom there were no fingerprints, inexplicably made the same type of specious argument concerening the fingerprints; *i.e.,* after physically handing some counterfeit bills to a juror, Mr. LaRossa stated: ". . . and let me tell you something, sir, odds to dollars, your fingerprints are on those bills, now . . ." (A. 291). Judge Judd politely interjected: "I don't think there is any evidence to sustain that statement, Mr. LaRossa" (A. 291); and there was, of course, no evidence at all to support such a broad statement.

judges take "more active supervision."* The statements made by Judge Judd were no more than what must necessarily be included in the ambit of Federal trial judge's discretion to make ". . . comment upon the evidence and inferences to be drawn therefrom . . ." *United States* v. *Tourine*, 428 F.2d 865, 869 (2d Cir. 1970), *cert. denied, sub. nom. Burtman* v. *United States*, 400 U.S. 1020 (1971). To say otherwise would be to deny such discretion altogether.

(2)

Appellants LaVecchia and Bogan, in the same vein, complain of the following two portions of the charge:

> There was a suggestion by the defendants that you should consider the fact that the defendants are businessmen and the witnesses are criminals. One of the problems federal courts have in trying to see that we do not deal with white-collar criminals on a different basis from the crimes of working men." (A. 383-A. 384)
>
> * * * * *
>
> If these defendants are not guilty you should acquit them. If you find they are guilty beyond a reasonable doubt, the fact that they are businessmen is no excuse and you might consider that for all that counsel said about Mr. McMillan's bad character. Mr. LaVecchia talked with him for several hours on Feb-

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* It is noteworthy that, although the *Pinto* decision was handed down following the conclusion of this case, the *DeAngelis* decision which also involved Judge Judd as the trial judge, was decided before this trial. And, though we do not believe counsels' summations in this case approached the conduct of defense counsel in *DeAngelis*, it was proper for Judge Judd to actively supervise their summations. Indeed, we would imagine that such supervision would be welcomed by this Court in view of its past criticism of Judge Judd's "patient and perhaps overly tolerant attitude. . . ." *Van Iderstine Company* v. *RGJ Contracting Co., Inc.*, 480 F.2d 454, 459 (2d Cir. 1973).

> ruary 13th and 15th although you are asked to believe it had nothiing to do with counterfeit, we have some testimony about fingerprints. (A. 384)

Appellant LaVecchia initially argues, referring to the last sentence quoted above, that "there was no evidence of [his] fingerprints beiing found on any of the counterfeit or related materials." Appellant is correct and, indeed, were the above quoted second portion of the charge accurate, the United States would be forced to concede that a *Pinto*-type problem existed. Nevertheless Judge Judd's statement: ". . . we have some testimony about fingerprints" was not stated to the jury as part of his charge concerning the "businessmen" character of these appellants, but as part of an entirely separate charge, which immediately followed, concerning the evaluation of Ball's expert testimony. Thus, the record should (and now does; see Government's Appendix, p. 8a) read as follows:

> If these defendants are not guilty you should acquit them. If you find they are guilty beyond a reasonable doubt the fact they are businessmen is no excuse and you might consider that for all that counsel said about Mr. McMillan's bad character, Mr. LaVecchia talked with him for several hours on February 13 and 15 although you are asked to believe it had nothing to do with counterfeit.
>
> We have some testimony about fingerprints. Normally, witnesses do not give opinions. They can only state facts. Those who have become experts in a science or a calling may state an opinion, as to relevant and material matters and may be called on to give reasons.

The entire tenor of the charge is different and we assume that counsel for appellants LaVecchia and Bogan would agree.

Left, thus, with the charge as corrected in the record, one cannot fathom any error. Certainly, this Court has approved far more prejudicial charges concerning the "good character" of defendants * and, while counsel in summation did properly argue that McMillan might have been more comfortable in implicating them, as opposed to others, it also carried the unavoidable implication that the jury should acquit because of the otherwise reputable circumstances of the defendants. Judge Judd properly dispelled that improper undertone.

(3)

While we firmly believe that no error at all was committed by Judge Judd, we add out of a sense of caution that any error must be considered in the light of both the entire charge and the evidence adduced at trial. As stated in *United States* v. *Bernbaum*, 373 F.2d 250, 257-258 (2d Cir.), *rehearing denied*, 375 F.2d 232, *cert. denied*, 389 U.S. 837 (1967):

> In evaluating the instructions to the jury, not only must each statement made by the judge be examined in light of the entire charge, but the charge itself can only be viewed as part of the total trial. Often isolated statements taken from the charge, seemingly prejudicial on their face, are not so when considered in the context of the entire record of the trial. Moreover, a juror's perception of the judge's attitude concerning the case, assuming he has displayed one, will be influenced not only by what the judge says in his charge, but also by how the judge conducted himself from the outset of the trial.

Judge Judd did tell the jury that while a federal judge may comment on the evidence, it is the jury that is the sole judge

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* See *United States* v. *Kabot*, 295 F.2d 848, 855 n. 1 (2d Cir. 1961), *cert. denied*, 369 U.S. 803 (1962), *approval continued except for last sentence in United States* v. *Birnbaum*, 337 F.2d 490, 498-499 (2d Cir. 1964).

of the facts (A. 385). Furthermore, Judge Judd, after commenting on the evidence, advised the jury that his discussion of the evidence should not in any way be construed as having expressed any opinion as to the guilt or innocence of any defendant (A. 391-A. 392). When viewed in the context of the entire proceeding, including the overwhelming evidence against LaVecchia and Bogan, any error in the charge must be viewed as harmless.

POINT II

The District Court properly denied appellant La Vecchia's motion to suppress evidence recovered during the search of his automobile.

Appellant La Vecchia challenges the trial court's decision denying his motion to suppress $2,450 in pre-recorded government monies. The money was part of the original $2,500 advanced to John McMillan for the purchase of counterfeit money, and was recovered from the trunk of a vehicle belonging to LaVecchia.*

The Government believes that the search of appellant LaVecchia's car trunk, minutes following his arrest, was reasonable under either of two separate theories, both of which derive from the fact that it was a search involving a car, as opposed to a dwelling. It is submitted that this search can be justified either under the vehicle forfeiture statute or under the traditional warrant exception for searches involving automobiles.

An evidentiary hearing was held prior to trial at which testiimony was given by five Secret Service Agents who were involved in the surveillance on February 15, in the arrest of LaVecchia, and in the actual search of the automobile.

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* The additional $50.00 was found on La Vecchia's person at the time of his arrest.

The Agents testified to a series of events which had taken place on February 15, 1973. Agent Ronald Kramer, who testified first, had actually given John McMillan the pre-recorded genuine currency which was the subject of the motion to suppress. Kramer testified that he both observed and overheard, over a Kel transmitter, conversations between La Vecchia and McMillan and that he personally observed La Vecchia leaving the area of his store on East 18th Street (A. 78). He further testified that he was later informed by other agents that La Vecchia was observed arriving at, entering and leaving the 270 Lafayette Street address a short time later (A. 79).

Agent John Simon testified to having personally observed a meeting between La Vecchia and Bogan which took place in La Vecchia's car. The vehicle was located on Park Avenue South between 17th and 18th Streets, a short distance from La Vecchia's store at 125 East 18th Street (A. 143).

Agent Kramer testified that he was informed by other agents that shortly after the meeting between La Vecchia and Bogan, La Vecchia returned to 125 East 18th Street and picked up McMillan. Agent Kramer followed La Vecchia's vehicle, and, after some further observations, met McMillan and proceeded with him to Penn Station. Using the key which McMillan told Kramer he had received from La Vecchia, $25,000 in counterfeit $10 notes was recovered. It was then that Kramer radioed to the other agents the order to arrest La Vecchia.

Agent Jeffrey Kierstead, who was one of the agents participating in the surveillance of the store, testified that at the time Agent Kramer's arrest order was received La Vecchia left the store and went to his car. Agent Kierstead

further testified that he observed La Vecchia opening the trunk of the car, but could not "see what he was doing inside" (~~A. 92~~ A. 113). After his return to the store, La Vecchia was arrested by Agent Dennis Satterlee, who took from him three to four thousand dollars and a set of car keys (T. 20). Agent Dale McIntosh actually searched the trunk of the car, on instructions from his superiors. His search resulted in the recovery of $2450 in pre-recorded government monies.

(1)

Initially, the Government maintains that the search was valid by virtue of the vehicle forfeiiture provisions in T. 49 U.S.C. Section 781 and Section 782. See *Cooper* v. *California*, 386 U.S. 58, 61 (1967); *United States* v. *Ayers*, 426 F.2d 524, 530 (2d Cir.), *cert. denied*, 400 U.S. 824 (1970); *United States* v. *Francolino*, 367 F.2d 1013, 1018 (2d Cir.), *cert. denied*, 386 U.S. 960 (1966). Under that forfeiture theory, and it is immaterial that the car itself was not subsequently forfeited, see *Lockett* v. *United States*, 390 F.2d 168, 172 (9th Cir.), *cert. denied*, 393 U.S. 877 (1968); *United States* v. *Capra*, 372 F. Supp. 600, 603 (S.D.N.Y. 1973), the Government believes that, based upon their general knowledge of the counterfeit trade, together with their specific knowledge of appellant La Vecchia's wide and continuous activity in that trade, as well as his activities immediately before the arrest, the agents had reasonable grounds to believe that the car "[had] been or [was] being used in violation of Section 781 . . ." T. 49, U.S.C., Section 782. As such, their search of the trunk was an ancillary matter which stemmed from their fundamental obligation, under the statute, to seize the car. Moreover, the fact that the search of the trunk preceded any "seizure" of the car, we believe, is irrelevant. As stated by the Court in *Chambers* v. *Maroney*, 399 U.S. 42, 52 (1970): "For constitutional purposes we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without

a warrant." See also, *Lockett* v. *United States, supra,* and *United States* v. *Capra, supra.* The central issue, then, was the right of the agents to behave, under the forfeiture statute, in an adverse manner towards the car and, necessarily, appellant's Fourth Amendment interest in the car and its contents.

Title 49 U.S.C. Section 781 not only provides that it is unlawful to use a vehicle to transport contraband, but also that the use of any vehicle to "facilitate the . . . conveyance, . . . receipt, . . . purchase, sale, barter . . . of any contraband article" is unlawful. While appellant La Vecchia asserts that there is a question as to whether the agents had probable cause to believe that his car contained contraband at the moment it was searched, there can be no question but that the agents had reasonable grounds to believe that the car "had been used," *United States* v. *Ayers, supra* at 530; *Lockett* v. *United States, supra* at 172, to facilitate the sale of the counterfeit to McMillan on that very day.

McMillan had advised the agents as to La Vecchia's extensive dealings in counterfeit notes. Prior to February 15th, Secret Service agents had determined that Bogan had a printing company at 270 Lafayette Street with offset presses, like those used to manufacture the bogus notes. On the 15th, after McMillan and LaVecchia finalized arrangements for the delivery of the $25,000 package, La Vecchia told McMillan that he was leaving to see the man who had the package (Bogan). LaVecchia was then observed leaving Beacon Sales in his Chrysler and subsequently arriving at 270 Lafayette Street whereupon he entered the building. A few minutes later, LaVecchia left the printing shop and after driving a short distance met with Bogan in his Chrysler (presumably this was when the key to the locker at Pennsylvania Station containing the bogus notes was given to LaVecchia). Thereafter, LaVecchia picked up McMillan at Beacon Sales in his Chrysler and transferred

the key to the locker to McMillan in exchange for the $2,500. From these facts, the agents certainly had reasonabe grounds to believe that the Chrysler had been used to facilitate the counterfeit transaction and therefore had the right to seize the vehicle, or, as in this case, initially search it (if there is any distinction at all).*

(2)

Should this Court determine otherwise, the Government contends that the search was lawful under the "automobile exception" to the warrant requirement.

The standards for determining when a warrantless search of a vehicle is permissible have been articulated and refined many times by the Supreme Court and by the various Circuit Courts. Though the threshold requirement of probable cause must always be met, "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars." *Chambers* v. *Maroney, supra* at 52. The fact that the object to be searched is an automobile does not obviate the need for a search warrant, even when probable cause clearly exists. "Exigent circumstances", generally related to the mobility or potential mobility of the vehicle, must be shown to render the search "reasonable." *Coolidge* v. *New Hampshire,* 403 U.S. 443, 459-460 (1971); *United States* v. *Young,* 489 F.2d 914, 915-916 (6th Cir. 1974).

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* In addition, the reasonableness of their conduct, we believe, was further supported by two factors which should be treated as a whole, despite the fact that, taken separately, they are also normally utilized justifications for the search of vehicles under those non-statutory cases which dispense with the warrant requirement in the case of vehicles. Thus, even if the agents merely had a strong suspicion that there was additional counterfeit in the trunk or that the marked money was there (although we believe that probable cause existed as to both items, see *infra*), the force of those two beliefs compel a finding that their conduct was reasonable. *United States* v. *Capra, supra; United States* v. *White,* 488 F.2d 563, 564 (6th Cir. 1973); *United States* v. *Gaudin,* 492 F.2d 132 (5th Cir. 1974).

The Government respectfully submits that first, probable cause to search the vehicle did in fact exist; and, second, that despite the fact that the owner of the vehicle was in custody, the possibility that the vehicle might be moved or tampered with, and the lack of sufficient "manpower" to effectively secure the vehicle, provided the exigent circumstances necessary to justify its immediate search.

The facts show that La Vecchia mad one trip in his car to a location suspected of being the place where the counterfeit currency was printed. Later that same day, at a time when he was supposedly going to set up the delivery of a package of counterfeit bills, he was observed meeting in that same car with Bogan. The actual exchange of $2,500 in marked money for the key to a locker containing $25,000 in bogus currency had occurred in the Chrysler. Additionally, only moments before his arrest, appellant went to his car and opened the trunk.

When viewed in light of this activity, Agent Kramer's testimony concerning his experience in investigating counterfeiting operations becomes particularly important:

> "Q. Based upon your experience, Agent Kramer, in purchasing counterfeit money from other individuals who sells counterfeit money to have more than the individual package for which he is prepared to sell?
>
> Mr. La Rossa: Objection.
>
> The Court: Overruled.
>
> The Witness: I would say yes, but I think two reasons. First of all, they might be able to sell you more if they have it available. They'll always push for a bigger sale just to really make as much money as possible.
>
> Two, it's a matter of, I guess, transportation. You're dealing with, I guess, a hot item. If you

can move it one time rather than two or three times, they prefer to take one chance than the many.

I would answer your question based on some of the buys I've worked in the affirmative. They would have more.

Q. Did that specifically occur in one of the transactions in this case?

Mr. La Rossa: Objection.
The Court: Overruled.
The Witness: Yes, Sir, it did" (A. 87-A. 88).

The testimony also indicated that there were gaps in time during the day, when appellant was not under surveillance, and that even when he was being surveilled, distance and the intervention of "obstructions" sometimes prevented the agents from seeing all that was happening. The tape recorded conversation between appellant and McMilland (Appellant La Vecchia's Brief at 38) disclosed only that appellant was arranging a "drop" for the counterfeit intended for McMillan; it in no way foreclosed the possibility that the appellant would also be obtaining, and transporting, additional counterfeit as well. The above facts and testimony support a finding of probable cause to believe that not only did the trunk contain additional counterfeit, but also, that it contained the rest of the pre-recorded funds.*

* The agents were not bound to believe, as appellant LaVecchia asserts, that the "three to four" thousand dollars found on his person necessarily included the $2,500 in pre-recorded funds. See *United States* v. *Furey*, 500 F.2d 338, 339-340 (2d Cir. 1974); *compare, United States* v. *Highfill*, 334 F. Supp. 700, 702 (E.D. Ark., 1971) and *United States* v. *Feldman*, 366 F. Supp. 356, 364 (D.C. Hawaii, 1973) cited at page 18 of the Government's brief in *Furey, supra*. Moreover, even if they subjectively believed that the money found on LaVecchia's person included the $2,500 in pre-recorded funds, they would have been justified in searching the vehicle at a later time. See *United States* v. *Ayers, supra* at 530; *Burge* v. *United States*, 342 F.2d 408, 412, 414 (9th Cir.), *cert. denied*, 382 U.S. 829 (1965).

Further, it is submitted that the circumstances surrounding the search wholly justified the failure to get a warrant. Four persons were placed under arrest at 125 East 18th Street. There is testimony in the record that a number of other persons were outside the store, persons who had been observed in the area of the store earlier in the day (A. 143-A. 144). Any one of those individuals might have been able to contact persons who could gain access to the parked automobile. To secure the automobile would have required one individual at least, to stay with the car, while another went for a search warrant. Even if the agents attempting to get a warrant to search 270 Lafayette Street could have been contacted and told to get another warrant, it must be remembered that these events were taking place after 5, and it was imperative that a search warrant be obtained for 270 Lafayette Street so that a thorough search could be made of the printing plant located there. In addition, arrests had been made at 270 Lafayette Street and the premises had to be secured pending the issuance of a search warrant.

In two recent cases, this Court has determined that the possibility that accomplices of the arrested parties might tamper with or move a vehicle, even where a vehicle is parked, *United States* v. *Ellis*, 461 F.2d 962, 966 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972) or where it is not even entirely certain that "accomplices" exist, *United States* v. *Carneglia*, 468 F.2d 1084, 1089-1090 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973), might give rise to the exigent circumstances which would justify the warrantless search of a car. In this case, such exigent circumstances clearly existed.*

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* If this Court rejects the position advanced by the Government, then it is submitted that any error in admission of this evidence at the trial was harmless. See *Chapman* v. *California*, 386 U.S. 18, 22 (1967); *Lockett* v. *United States*, 390 F.2d 168, 174 (9th Cir.), *cert. denied*, 393 U.S. 877 (1968). In this case,

[Footnote continued on following page]

POINT III

The single conspiracy charged against these appellants was appropriate to the evidence and, in any event, no unwarranted prejudice developed by reason of the Government's proof.

By the contentions of all the appellants, this Court is invited once again into the unending interpretation and application of *Kotteakos* v. *United States*, 328 U.S. 750 (1946). That case, in its most essential formulation, requires that the Government must not charge as one conspiracy, a series of conspiracies which separately emanate from and revolve about a central figure or "hub". On that premise, therefore, each of the appellants contends that the proof showed more than one conspiracy. Mindful, however, that "[t]he true inquiry is not whether there has been a variance of proof, but whether there has been such a variance as to 'affect . . . [their] . . . substantial rights' . . .", *Berger* v. *United States*, 295 U.S. 78, 82 (1935), see also, *United States* v. *Agueci*, 310 F.2d 817, 827 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963), appellants urge prejudice. In the Government's view, appellants' claims are without merit.

A. There was no variance.

In determining whether a criminal enterprise, such as the one in this case, which involves different actors at different times, can properly be described as a single conspiracy, this Court has stated "[t]he nature of the enter-

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the evidence against La Vecchia was overwhelming. In addition to the testimony of McMillan which was corroborated by the testimony of several Secret Service agents, the tape recording of the conversation between La Vecchia and McMillan on February 15th as to the counterfeit transaction was devastating. Furthermore, $50 of the marked money used in the counterfeit purchase was found on La Vecchia's person. It is submitted that the receipt in evidence of the remaining marked money was harmless.

prise determines whether the inference of knowledge of the existence of others in the overall conspiracy is justified." *United States* v. *Agueci, supra* at 827. In this case, the evidence showed that, over a three year period of time, well in excess of a quarter of million dollars in counterfeit money was produced and sold, on consignment, by the appellants Bogan and La Vecchia to a middleman, McMillan. In turn, McMillan, though the aid of Russo, sold varying portions of the counterfeit to the appellants Andriotis and Kurshenoff and others. In the Governments' view, such an arrangement can admit, on appellate review, of no other description but as a "chain conspiracy", most frequently encountered in narcotics distribution cases.*

The "inference of knowledge" of an overall conspiracy is, of course, not overcome by the "mere fact that certain members of the conspiracy deal recurrently with only one or two others . . ." *United States* v. *Agueci, supra* at 826. Certainly, as to appellants La Vecchia and Bogan, given their role in the conspiracy, it would be "unrealistic" to assume that they were unaware that McMillan, who was purchasing such huge quantities, was not disposing of the counterfeit to lower echelon distributors. *United States* v. *Arroyo*, 494 F.2d 1316, 1319 (2d Cir.), *cert. denied*, — U.S. — (43 U.S.L.W., 3208; Oct. 15, 1974). In any event, apart from the natural inference, the evidence is clear that McMillan repeatedly purchased the counterfeit on consignment and, as such, La Vecchia and Bogan were obviously aware "that their actions [were] inextricably linked to a large on-going plan or conspiracy "(*id.*); compare, *United*

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* In reviewing the evidence supporting a jury's verdict of guilt, this Court has frequently stated that the inferences most favorable to the Government will be drawn. See *United States* v. *Glasser*, 315 U.S. 60, 80 (1942). Thus, in *United States* v. *Sperling*, — F.2d — (2d Cir. Slip. op. 5637, 5664-5665, Oct. 10, 1974), where the evidence showed two connected conspiracies, this Court nevertheless held that the evidence also showed "one large conspiracy to distribute enormous amounts of heroin and cocaine for profit" (id. at 5664).

States v. *Peoni,* 100 F.2d 401 (2d Cir. 1938). Given the consignment arrangement, together with their repeated manufacture and delivery to McMillan, the cautionary language they cite from *United States* v. *Borelli,* 336 F.2d 376, 38 (2d Cir. 1964), *cert. denied,* 379 U.S. 960 (1965)* is hardly appropriate.

The inference of appellants Andriotis' and Kurshenoff's knowledge of an overall conspiracy, while admittedly less compelling, is still present in this record. The so-called "single act" cases, e.g., see cases cited in *United States* v. *Cirillo,* 499 F.2d 872, 887 (2d Cir. 1974), which have involved the examination of isolated conduct as a basis for the inference, are inapplicable to the facts surrounding their association with McMillan and Russo, the core middlemen. In sum, we believe that the record shows (as with Venetucci, Lilienthal and Cesare in the *Cirillo* case) a "deeper involvement on the part of each of these participants," *United States* v. *Cirillo, supra* at 887, sufficient to warrant an "inference of knowledge of others [manufacturers' and suppliers like Bogan and La Vecchia] in one overall conspiracy" *United States* v. *Agueci, supra* at 827.

"From evidence of knowledge of the conspiracy and a transaction with one of its members it would be reasonable to infer intent to participate in it . . . ." *United States* v. *Aviles,* 274 F.2d 179, 190 (2d Cir.), *cert. denied,* 362 U.S. 974 (1960). "The so-called single transaction rule is not an arbitrary rule which is to be applied rigidly and without reason. It has been utilized to exonerate a defendant only when there is no independent evidence tending to prove that

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* At pages 46-47 of their brief, appellants La Vecchia and Bogan quote the following language from Borelli:

> But a sale or purchase scarcely constitutes a sufficient basis for inferring agreement to cooperate with the opposite parties for whatever period they continued to deal in this type of contraband, unless some such understanding is evidenced by other conduct which accompanies or supplements the transaction.

the defendant had some knowledge of the broader conspiracy and when the single transaction is not in itself one from which such knowledge might be inferred". *United States* v. *Agueci, supra* at 836.

Appellant Andriotis was introduced to McMillan by Russo. Russo and/or McMillan met with appellant Andriotis on several occasions to negotiate the price, and when an agreement was reached Russo delivered the counterfeit notes to Andriotis' agent "Paul", after Andriotis indicated what quantity of notes he wanted. When McMillan met with Andriotis to negotiate the price, i.e. "points", McMillan indicated that the price at which Andriotis would be purchasing the counterfeit was only one point higher than his own cost. From that an inference can certainly be drawn that Andriotis was aware that other individuals were involved in this distribution operation.

Appellant Kurshenoff purchased the counterfeit notes on two separate occasions from Russo; hardly a "single transaction". The first time they discussed counterfeit funds Russo could only show him a sample. Russo had to call him when he received more of the counterfeit notes to complete the first transaction. The second time Russo called Kurshenoff and told him that he had some more and was coming over with it (T. 406). Appellant Kurshenoff thus expressed a willingness to continue to purchase counterfeit funds, funds which he had no reason to assume Russo was making himself.

Certainly, taken alone, the fact that Andriotis and Kurshenoff met on several different occasions with members of the larger conspiracy, in Andriotis' case two different members, is an important point to be considered in deciding whether they knew of the larger conspiracy. See *United States* v. *Cirillo, supra.*

As in narcotics conspiracies where a buyer must be aware that there are other individuals higher in the structural organization than his immediate seller, so too in a counterfeit conspiracy the lower level distributors must be aware that the counterfeit had to have been printed by someone. There was no reason for Andriotis or Kurshenoff to assume that Russo did the printing. In fact, if anything, Kurshenoff and Andriotis must have believed it was printed by someone else in view of Russo's education and general level of intelligence.

There can, therefore, be no question but that appellants Kurshenoff and Andriotis were involved in a conspiracy to distribute bogus currency in 1972 with Russo and McMillan. When Kurshenoff and Andriotis did business with Russo and/or McMillan, it can be inferred that they knew of the existence of others who were delivering funds to Russo or McMillan, for, just as the success of the venture was dependent on LaVecchia and Bogan, so too was the operation's success dependent on Kurshenoff's and Andriotis' purchasing and distributing.

From this involvement, the principles of law in conspiracy cases become operative and thus expand Kurshenoff's and Andriotis' responsibility to include the acts of others in 1971 and 1973, the former by adoption (see *United States* v. *Sansone,* 231 F.2d 887, 893 [2d Cir.], *cert. denied,* 351 U.S. 987 [1956]), and the latter because Kurshenoff and Andriotis failed to commit an affirmative act of withdrawal, e.g. no showing of abandonment (see *Hyde* v. *United States,* 225 U.S. 347, 369 (1912); *United States* v. *Cirillo,* 468 F.2d 1233, 1239 [2d Cir. 1972], *cert. denied,* 410 U.S. 989 (1973)). On these principles, this Court has repeatedly held in circumstances similar to that which Andriotis and Kurshenoff find themselves in, i.e., where appellants have participated in seemingly isolated events, that their actions were sufficient to bring them within the broad conspiracy charged. See: appellants Scopelletti (a

single delivery of heroin) and Cottone (one use of his truck to pick up heroin) in *United States* v. *Agueci, supra;* appellant Moccio (single purchase of large quantity of narcotics) in *United States* v. *Reina,* 242 F.2d 302 (2d Cir.), *cert. denied,* 354 U.S. 913 (1957); and appellant DeRoi (knowledge of common origin of narcotics combined with size of the transaction), in *United States* v. *DeNoia,* 451 F.2d 979 (2d Cir. 1971).

B. There was no prejudice.

Should this Court find that the evidence adduced at trial did not establish a single conspiracy but rather established three separate conspiracies, one for each of the three years involved, 1971, 1972, 1973, there would still be no reason to upset the verdict of the jury.

Appellants Bogan and LaVecchia would in no way be prejudiced by such a finding. Agent Coppola testified that all of the counterfeit notes introduced at trial, notes which encompassed purchases and/or seizures in all three years, were printed by offset printing presses such as the presses seized at 270 Lafayette Street and were produced as the result of the use of the counterfeit negatives seized at 270 Lafayette Street. McMillan testified as to counterfeit dealings with appellant LaVecchia in all three years. Appellant Bogan was tied into the conspiracy in 1971-1973 by the testimony of Agent Coppola, in 1972 by the testimony of McMillan and in 1973 by the testimony of McMillan and the seizure at his printing shop.

Appellants Andriotis and Kurshenoff were not part of the 1971 or 1973 activities; however the jury need not have considered evidence from those two years in order to convict them. In fact, Judge Judd explicitly charged the jury that if they should find there were separate conspiracies in 1971, 1972 and 1973, then statements and transactions made in 1971 and 1973 could not be used against appellants Andrio-

tis and Kurshenoff (A. 376-A. 377). There is no reason to assume the jury would ignore this instruction.

Appellant Andriotis argues that he was prejudiced further on the substantive count by being included in the conspiracy count. Yet, all of the testimony admitted at the trial concerning Andriotis would have been admissable at a trial solely on the substantive count. Even if there was insufficient evidence to include Andriotis in the broad conspiracy charged in Count 12, there was still sufficient evidence to show that he was part of a smaller joint venture or conspiracy, consisting of, McMillan, Russo, Andriotis and "Paul", during 1972.

POINT IV

The search warrant for 270 Lafayette Street was properly issued.

Appellants LaVecchia and Bogan contend that the affidavit in support of the search warrant for Beacon Printing, appellant Bogan's place of business at 270 Lafayette Street, in Manhattan, was fatally defective in two respects: (1) it failed to establish probable cause; and (2) it contained a deliberately and materially false statement. Appellants' contentions are frivolous.

(1)

Read in its entirety, it can be seen that Agent Tully's affidavit in support of the search warrant is nearly a full narrative of McMillan's dealings with appellants LaVecchia and Bogan throughout the conspiracy.* It is a wealth of information and was drawn with painstaking detail. In

* Tully's entire affidavit, which consisted of a form cover sheet and a rider of four pages, has been reproduced in the Government's Appendix (Government's Exhibit 1; G.A. 9a-13a). It was marked before Judge Judd during the course of the suppression hearing (A. 48). Appellants' Joint Appendix inadvertently has omitted the last three pages of the rider (A. 21-A. 23).

addition to the information imparted by McMillan, the affidavit sets forth, *inter alia*, the electronic and physical surveillance conducted by Secret Service Agents on February 13 and 15, 1973; the previous undercover visit to Beacon Printing by Agent Marquez and his observation of the offset printing equipment; the arrest that afternoon of Bogan at Beacon and the seizure of counterfeit money from his person; and the full circumstances surrounding the arrest of LaVecchia. Appellants' contention that the affidavit contained "nothing to indicate that on February 15th, 1973, evidence pertaining to the crimes could be found at [Beacon]" (Br. p. 51), is simply absurd. Judge Stewart, before whom the affidavit was first challenged, found that it ". . . clearly meets the tests for sufficiency for a probable cause finding by the Supreme Court in *Aguilar* v. *Texas*, 378 U.S. 108 (1964) and *Spinelli* v. *United States*, 393 U.S. 410 (1969)" (A. 177).

(2)

When appellants Bogan and LaVecchia * sought to relitigate the validity of the search before Judge Judd, they did not raise again the claim that probable cause was lacking. Instead, they claimed—as they belatedly had before Judge Stewart—that a materially false and deliberate misstatement was made by Tully in the affidavit. That alleged false statement was as follows:

> McMillan advised that Anthony La Vecchia had two business locations in Manhattan one located at 125 East 18th Street and 270 Lafayette Street, on the second floor, known as, Beacon Discount Sales, Inc. Subsequently, investigation was initiated by the affiant and other agents operating at his direction and a review of the files of Dun & Bradstreet, Inc., New York, New York reveal that Anthony LaVecchia

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* We doubt that appellant La Vecchia had standing to contest, in the Eastern District case, the seizures made at Beacon. See, *Brown* v. *United States*, 411 U.S. 223, 229 (1973); *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1205 (2d Cir. 1973).

was, in fact, d/b/a Beacon Discount Sales at 270 Lafayette and at 125 East 18th Street in partnership with Edward Bogan and that Bogan and LaVecchia also operate Beacon Printing at 270 Lafayette Street (G.A. 10a-11a).

Appellants claim, and it is not disputed, that the Dun & Bradstreet report shows appellant Bogan as having an interest in Beacon, but not appellant La Vecchia. Based on that fact, they urge that the foregoing statement is false.*

Following a hearing, at which Tully was the sole witness, Judge Judd found that there was ". . . no basis for charging they [the statements] were perjurious" [A. 73].** In addition, Judge Stewart had previously found tha "[a]ny *possible* misrepresentations in the affidavit with respect to the Dun & Bradstreet report are . . . immaterial" (emphasis added) (A. 175, n. 1). Judge Stewart also found that there was "no showing at all that they were inten-

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* At the hearing below, Judge Judd took the view that the second sentence "can reasonably mean the investigation by the witness *and* the investigation by the agents operating at his direction *and* review of the Dun & Bradstreet files reveal these facts" (A. 65; emphasis added). He further stated (A. 66) that "it must mean the Dun & Bradstreet report and the other information. The Dun & Bradstreet report shows Bogin [sic] was at 270 Lafayette [Beacon] The other information shows La Vecchia was at 270 Lafayette." Moreover, counsel for LaVecchia conceded that the sentence could be interpreted "in almost any way you choose" (A. 67), but insisted that, because Tully, apparently, intended the statement to be read as appellants would read it, that the magistrate read it in the same way.

** In substance, Tully testified that the statement concerning Dun & Bradstreet, as well as the entire affidavit, had been prepared under the direction of an Assistant United States Attorney. The information concerning Dun & Bradstreet had been telephonically relayed to him by Agent O'Callahan who had read a report in the office (A. 50-A. 51). There was no evidence as to when, either during transmission or transcription, the error, if any, first appeared. It is clear, also, that the affidavit was prepared under considerable time pressures.

tional." Those three separate findings were amply supported by the record and there is no basis, whatever, to disturb them. See, *United States* v. *D'Avanzo*, 443 F.2d 1224, 1226 (2d Cir.), *cert. denied*, 416 U.S. 956 (1970).

Clearly, even if the magistrate read the statement as appellants would read it, the remaining portions of the affidavit fully connect appellants Bogan and LaVecchia. Thus, the affidavit recites McMillan's identification of Bogan as the person who had delivered, in 1972, $25,000 in counterfeit to LaVecchia; that Bogan had offset printing equipment; and that LaVecchia went to Beacon after McMillan placed the order for $25,000 in counterfeit and shortly afterwards spoke with Bogan from there by telephone, after their paths crossed, and was advised by Bogan that "the package is already there, I've got the key. I'll meet you" (G.A. 12a). Thereafter, Bogan did, in fact, meet with LaVecchia at 17th Street and Park Avenue. Following that meeting, LaVecchia gave McMillan the key to the locker at Pennsylvania Station. Given that information, it was immaterial what interpretation the magistrate gave to the report from Dun & Bradstreet.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

Dated: January 13, 1975

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
DAVID A. DE PETRIS,
Assistant United States Attorneys,
*Of Counsel.**

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* The United States Attorney's Office wishes to acknowledge the assistance of Jon M. Lewis and Lois Wasoff in the preparation of this brief. Mr. Lewis is a June 1974 graduate of St. John's University Law School. Ms. Wasoff is a third year student at New York University Law School.

GOVERNMENT'S APPENDIX

INDEX TO GOVERNMENT'S APPENDIX

Order to Show Cause

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

[illegible] Cr. 305

UNITED STATES OF AMERICA

—against—

ANTHONY LAVECCHIA, et. al.,

Defendants.

Upon the application of David G. Trager, United States Attorney for the Eastern District of New York, the affidavit of David A. DePetris, Assistant United States Attorney, attached, it is

ORDERED that the defendants Anthony LaVecchia, Edward Bogin, Herbert Kurshenoff and Nicholas Andriotis, or their attorneys appear before the United States District Court for the Eastern District of New York on the 10th day of January, 1975 at 10:00 A.M., in Courtroom No. 11 in the United States Court House, 225 Cadman Plaza East, Brooklyn, New York, to show cause why this Court should not enter an Order pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure to correct certain portions of the trial transcript in the case of *United States* v. *Lavecchia, et. al.;* and it is further

ORDERED that service of this Order to Show Cause on defendants by telephonic communication to the Offices of Counsel of record before 4:00 P.M. on the 9th day of January 1975 shall be good and sufficient service of this Order.

Dated: Brooklyn, New York
January 9, 1975

/s/ ORRIN G. JUDD
United States District Judge

Affidavit of David A. De Petris

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 Cr. 305

UNITED STATES OF AMERICA

—against—

ANTHONY LAVECCHIA, et. al.,

Defendants.

State of New York,
County of Kings,
Eastern District of New York, ss.:

DAVID A. DE PETRIS, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney for the Office of David G. Trager, United States Attorney for the Eastern District of New York. I submit this affidavit in support of an order to correct certain portions of the trial transcript in the case of *United States* v. *LaVecchia, et. al.*, pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure.

2. I was the Assistant United States Attorney who prosecuted the above captioned case. In preparing the Government's brief for the 2nd Circuit Court of Appeals, I noticed what I believed were certain errors in the transcription of this Court's charge to the jury. Upon con-

sulting with Michael Miele, the Official Court Reporter for the Eastern District of New York who recorded by means of a stenographic machine, that portion of this Court's charge which is the subject of this application, it was revealed that there were certain errors in transcription made at page 1204 of the trial transcript. Attached hereto is the affidavit of Michael Miele identifying the errors in transcription with the appropriate corrections.

3. This application is sought by order to show cause instead of ordinary notice of motion because the Government's brief is due on Monday, January 13, 1975 and the argument of this case in the 2nd Circuit Court of Appeals is scheduled for Wednesday, January 22, 1975. Further, the specific portion of the transcription sought to be corrected by this application is relevant to the appeal pending in the 2nd Circuit Court of Appeals.

4. No previous application for similar relief has been made.

WHEREFORE, it is respectfully requested that the above relief be granted.

DAVID A. DE PETRIS
Assistant U. S. Attorney

Sworn to before me this
9th day of January 1975

.....

Affidavit of Michael Miele

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 Cr. 305

UNITED STATES OF AMERICA

—against—

ANTHONY LAVECCHIA, et. al.,

Defendants.

State of New York,
County of Kings,
Eastern District of New York, ss.:

MICHAEL MIELE, being duly sworn, deposes and says:

1. That I am an Official Court Reporter for the Eastern District of New York.

2. That on June 27, 1974, I recorded by means of a stenographic machine, a portion of the charge by the Honorable Orrin G. Judd, United States District Judge for the Eastern District of New York in the case of *United States* v. *Anthony Lavecchia, et. al.*

3. That upon review of my stenographic notes, I found certain errors at page 1204 of the trial transcript in the first paragraph, in that at line 13 after the word "counterfeit" the coma should be a period and the word "we" should begin a new sentence and new paragraph. That the errors

were made by the note reader who improperly interpreted the stenographic notes when typing the same for daily copy.

4. That as corrected, paragraphs one and two on page 1204 of the trial transcript should read as follows:

> "If these defendants are not guilty you should acquit them. If you find they are guilty beyond a reasonable doubt the fact they are business men is no excuse and you might consider that for all that counsel said about Mr. McMillan's bad character. Mr. LaVecchia talked with him for several hours on February 13 and 15 although you are asked to believe it had nothing to do with *counterfeit.*
>
> *We* have some testimony about fingerprints. That brings up a rule about expert testimony. Normally, witnesses do not give opinions. They can only state facts. Those who have become experts in a science or a calling may state an opinion, as to relevant and material matters and may be called on to give reasons." (Emphasis Added)

MICHAEL MIELE
Official Court Reporter
Eastern District of New York

Sworn to before me this
9th day of January 1975

.....

Transcript of Hearing of January 10, 1975

(1)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 Cr. 305

UNITED STATES OF AMERICA

—against—

LA VECCHIA, et al.,

Defendants.

United States Courthouse
Brooklyn, New York

January 10, 1975
11:00 o'clock A.M.

Before: HONORABLE ORRIN G. JUDD, *U.S.D.J.*

HENRY LE GENDRE
Acting Official Court Reporter

(2)

APPEARANCES:

DAVID G. TRAGER, ESQ.
United States Attorney for the
Eastern District of New York

By: PAUL BERGMAN, ESQ.
and
DAVID DE PETRIS, ESQ.,
Assistant U.S. Attorneys

RONALD FISCHETTI, ESQ.,
Attorney for the Defendants.

Transcript of Hearing of January 10, 1975

(3)

The Clerk: United States of America versus Anthony La Vec hia, et al.

Mr. Fischetti: Good morning, your Honor.

Mr. De Petris: Your Honor, pursuant to the service order I contacted Mr. Krinsky yesterday afternoon and Mr. Krinsky advised me he had to be in three courts this morning other than the Eastern District, and I explained to him what the order to show cause was about and he said that it didn't directly affect his client and that he had no objection, he would take no position on the matter and whatever argument other counsel made he would join in.

Mr. Bergman: I spoke with Mr. Leitel, counsel for Andriotis.

The Court: He was here earlier.

Mr. Bergman: He left. He told me he takes no position.

The Court: Mr. Fischetti, this is a cosmetic motion; any objection to it?

Mr. Fischetti: No, but I appear for both Mr. Bogan and Mr. La Vecchia and the service to show cause telephonically was within the prescribed time and we have no objection to the entering of the order.

The Court: I would add one more thing, I guess we go by the stenographer's notes, after the word (3a) character, there should be a comma after character. This was not part of my written notes. This was something that I interpolated. Motion will be granted. Submit an order.

Order

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73-Cr.-305

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—against—

ANTHONY LA VECCHIA, EDWARD BOGAN, HERBERT KURSHENOFF and NICHOLAS ANDRIOTIS,
Defendants-Appellants.

Upon motion of the United States, by David G. Trager, United States Attorney for the Eastern District of New York, pursuant to Rule 10(e) of the Federal Rules of Appellate Procedure, it is hereby ordered that the transcript of the trial proceedings in this case be corrected, at page 1204, at lines 6 through 20, to read as follows:

> If these defendants are not guilty you should acquit them. If you find they are guilty beyond a reasonable doubt the fact they are businessmen is no excuse and you might consider that for all that counsel said about Mr. McMillan's bad character, Mr. LaVecchia talked with him for several hours on February 13 and 15 although you are asked to believe it had nothing to do with counterfeit.
>
> We have some testimony about fingerprints. Normally, witnesses do not give opinions. They can only state facts. Those who have become experts in a science or a calling may state an opinion, as to relevant and material matters and may be called on to give reasons.

Dated: January 10, 1975

/s/ ORRIN G. JUDD
ORRIN G. JUDD
U. S. D. J.

EXHIBIT 1

Affidavit for Search Warrant

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Magistrate's Docket No. 3

Case No. 215

In the Matter of an Application by the United States of America for a Warrant to Search the Premises known as Beacon Discount Sales and Beacon Printing located in the Southeast Section of the Second Floor of a 15 story building at 270 Lafayette Street, New York, New York.

Before: HON. MARTIN D. JACOBS, U.S. Magistrate, U.S. Cthse., Foley Sq. N.Y.C.

The undersigned being duly sworn deposes and says:

That he (has reason to believe)[1] that (on the premises known as) Beacon Discount Sales and Beacon Printing located in the Southeast Section of the Second Floor of a 15 story building at 270 Lafayette Street, New York, New York, in the Southern District of New York, there is now being concealed certain property, namely counterfeit Federal Reserve notes, United States Postage Stamps and plates,

[1] The Federal Rules of Criminal Procedure provides: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

negatives and other paraphrenalia [sic] for the making of such counterfeit notes and stamps which are designed or intended for use and or have been used as the means of committing a criminal offense, to wit, violations of Title 18, United States Code, Sections 471, 472, 473, 474, 476 and 477.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

Rider

I am Special Agent Thomas J. Tully, United States Secret Service 90 Church Street, New York City. I have conducted or supervised the investigation of one Anthony La Vecchia concerning the distribution of $10 counterfeit Federal Reserve notes. On January 12, 1973 I participated in the arrest one John McMillan and assisted in the taking of a statement from him. McMillan admitted that over a period from August 1971 through September 1972 he had obtained from Anthony La Vecchia approximately $500,000 face value in counterfeit $10 Federal Reserve notes. That he had paid Anthony La Vecchia between 8½ and 9 percent of the face value for these counterfeits; that this amount of counterfeit was purchased from La Vecchia in varying amounts between $25,000 and $300,000 face value of the counterfeit; that on several occasions he went to La Vecchia's residence at 161 Bay 31st Street, Brooklyn, New York and obtained the counterfeits from La Vecchia in that neighborhood. That on one occasion in June or July, 1972 he was present in La Vecchia's residence on Bay 31st Street, and observed a white male of average size make the delivery of $25,000 in counterfeit $10 notes to La Vecchia which La Vecchia immediately transferred to him, McMillan; he noted at that time the distinctive accent and timber of the voice of the person making the delivery.

McMillan advised that Anthony La Vecchia had two business locations in Manhattan one located at 125 East

18th Street and 270 Lafayette Street, on the second floor, known as, Beacon Discount Sales, Inc. Subsequently, investigation was initiated by the affiant and other agents operating at his direction and a review of the files of Dun & Bradstreet, Inc., New York, New York reveal that Anthony LaVecchia was, in fact, d/b/a Beacon Discount Sales at 270 Lafayette and at 125 East 18th Street in partnership with Edward Bogan and that Bogan and La Vecchia also operate Beacon Printing at 270 Lafayette Street. On February 13, 1973 John McMillan acting as an undercover informant and equipped with an electronic transmitter and under my supervision and surveillance approached Anthony La Vecchia at 125 East 18th Street and advised La Vecchia that he had a customer for some counterfeit $10 notes. La Vecchia and McMillan agreed on an order of $25,000 at 10 per cent. La Vecchia indicated that he was short of cash and that he would need the money at the time of the sale and that he would contact McMillan that evening and let him know if everything was all right. McMillan indicated that he would prefer to take delivery on February 15. Affiant overheard said conversation on the electronic monitoring device from a surveillance position.

John McMillan advised Special Agent Ronald Kramer on February 14 that La Vecchia had telephoned him at his residence on the evening of February 13 and advised him that everything was all right for Thursday.

On February 15, at approximately 2:15 p.m. McMillan was equipped with an electronic transmitting device and was provided with $2,500 pre-recorded government funds and directed to approach Anthony La Vecchia for the purpose of obtaining delivery of the $25,000 counterfeit notes under affiants observation and supervision McMillan entered 125 East 18th Street. Affiant overheard on the electronic monitoring device general conversation between McMillan and La Vecchia and then overheard La Vecchia indicate to

McMillan that everything was all right and that he would call the man and have the package put in the locker and gave him the key.

Shortly thereafter, at approximately 3:15 p.m. affiant observed La Vecchia leave 125 East 18th Street in his automobile and affiant received reports from surveillance affiants own car radio that said affiants had delivered [sic] La Vecchia to 270 Lafayette and seen him enter the building and seen him come out in ten or fifteen minutes.

Approximately ten minutes after La Vecchia left, affiant observed a man, later identified as Edward Bogan, (the previously described business partner of La Vecchia) enter 125 East 18th Street and was observed a few minutes later to come out of the store and wait in front of the store.

After about five minutes, affiant overheard on the monitoring device, Bogan ask McMillan whether Anthony would be right back and McMillan answered that Anthony said he was going down town and probably went to your place and Bogan said o.k. let me call him. McMillan7 [sic] advised the affiant that he overheard Bogan talking to Anthony La Vecchia on the telephone stating "the package is already there, I've got the key. I'll meet you."

In a conversation with McMillan this evening, affiant was advised by McMillan that the man making the telephone call to La Vecchia was the same person who had delivered the package of counterfeit notes to La Vecchia in July 1972 —to his residence as previously related.

Subsequent to the telephone call Bogan left 125 E. 18th on foot and was observed by the affiant to go west on E. 18th St. He was observed by other agents walking to 17th Sts. and Park Ave. South where he met with Anthony La Vecchia and La Vecchia was observed to depart in his car and drive to Beacon Discount Sales at 125 E. 18th where he picked up John McMillan. He was then observed driving to 29th St. and Lexington, where La Vecchia made a tele-

phone call, and then to 23rd and Lexington whereupon MacMillan left the vehicle and telephoned the Street Service office and informed Special Agent Kramer that La Vecchia had just given MacMillan the key to locket [sic] W583 at Penn Saation [sic] Manhattan and that La Vecchia had been given the government prerecorded funds.

Kramer and MacMillan then went to the locker at Penn Station. MacMillan removed the package under the observation of Kramer. The package was examined by Kramer and found to contain approximately 25,000 counterfeit funds, whereupon Kramer notified affiant and other agents and Bogan and La Vecchia were arrested, and La Vecchia was found to have prerecorded government funds on his person Bogan was arrested on the premises of Beacon Discount Sales at 270 Lafayette St. and had in his possession at that time a $5 counterfeit Federal Reserve Note printed by the offset method and two counterfeit 8 cent U.S. postage Stamps. Officers making the arrest observed offset printing presses and other printing paraphernalia used in the offset printing process. This machinery had also been observed by a Secret Service agent in the disguise of a messenger who had visited Beacon Discount Sales and Beacon Printing on or about January 22, 1973.

Affiant has inspected the $10 counterfeit notes and observed that they are printed on the offset process.

/s/ THOMAS J. TULLY
THOMAS J. TULLY
Special Agent, U.S. Secret Service

Sworn to before me, and subscribed in my presence, February 15, 1973.

/s/ MARTIN D. JACOBS
MARTIN D. JACOBS
United States Magistrate

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 16th day of January 1975 he served 2 copies of the within

Brief and Appendix for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

LaRossa, Shargel & Fischetti, Esqs., 522 Fifth Avenue, New York, N. Y. 10036; Barry Krinsky, Esq., 66 Court Street, Brooklyn, N. Y. 11201; Foner & Leitel, Esqs., 188 Montague Street, Brooklyn, N. Y. 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
16th day of January 1975

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977